IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
WESTERN DIVISION

LAJIM, LLC, an Illinois Limited Liability Corporation, PRAIRIE RIDGE GOLF COURSE, LLC, an Illinois Limited Liability Company, LOWELL BEGGS, and MARTHA KAI CONWAY,	)	
Plaintiffs,	)	Case No. 13-cv-50348
v.	)	Presiding Judge Iain D. Johnston
GENERAL ELECTRIC COMPANY, a New York Corporation,	)	
Defendant.	)	

DEFENDANT GENERAL ELECTRIC COMPANY'S COMBINED PETITION TO AMEND AND CERTIFY THE DECEMBER 18, 2015, ORDER FOR APPEAL PURSUANT TO 28 U.S.C § 1292(b) AND MOTION TO STAY THE PROCEEDINGS PENDING APPEAL

While federal district courts do not routinely grant petitions for interlocutory appeals, the Seventh Circuit has explained that "[i]t is equally important . . . to emphasize the duty of the district court and of [the Seventh Circuit] as well to allow an immediate appeal to be taken when the statutory criteria are met." *Ahrenholz v. Board of Trustees of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)[1]. A district court may certify an order for interlocutory appeal when: (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion concerning the ruling exists, and (3) an immediate appeal would materially advance the disposition of the litigation. 28 U.S.C. § 1292(b). As GE shows below, this is the type of extraordinary case in which the criteria for certifying an order for interlocutory appeal are satisfied. The controlling

[1] Pursuant to Rule 5, Federal Rules of Appellate Procedure, this petition must be filed first with the district court and, before filing with the circuit court, the district court must grant permission to appeal by amending its order to include the required permission or statement. Defendant GE files the petition now to ensure that it is timely.

issue of law is: whether the State of Illinois' earlier-filed enforcement action in state court under the Illinois Environmental Protection Act, which is a USEPA authorized program in lieu of RCRA, but not *expressly* under RCRA § 6972(a)(1)(B), bars a later-filed citizen suit against GE pursuant to RCRA § 6972(b)(2)(C)(i). Resolution of this issue ultimately determines whether the court may address the merits of Plaintiffs' claims and, thus, would materially advance disposition of the litigation where there is no dispute that the prior state action culminated in a Consent Order between the State of Illinois and GE which provided overlapping relief to that requested in the Plaintiffs' citizen suit filed three (3) years later.

Accordingly, GE respectfully petitions the Court to certify its December 18, 2015 Memorandum Opinion and Order (Doc. # 88) for immediate appeal to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

I. BACKGROUND

The facts underlying the question of law that GE requests be presented to the Seventh Circuit are undisputed. GE set out those facts in its summary judgment briefing [*See* Doc #s 54, 58, and 71], and the Court recited them in its December 18, 2015 Memorandum Opinion and Order. In February 2004, the Illinois Attorney General filed suit in state court against GE seeking injunctive relief requiring GE to determine the nature and extent of soil and groundwater contamination and then to perform any necessary remediation. Then, in December 2010 the State of Illinois and GE entered into a Consent Order which required GE, with oversight and approval of the Illinois EPA ("IEPA"), to conduct a series of investigative activities and, based on the results of those investigation activities, evaluate and implement appropriate remedial measures necessary to protect health and the environment. While GE was conducting the investigative work under the direction and supervision of IEPA, on November 1, 2013, the Plaintiffs filed a citizen suit under

RCRA § 6972(a)(1)(B) seeking a mandatory injunction requiring GE to remediate the same contamination in the same Morison, Illinois area.

Under RCRA's citizen suit provisions, "any person may commence a civil action . . . against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). However, "[n]o action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . . has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section." 42 U.S.C. § 6972(b)(2)(C)(i)."

In its December 18, 2015, Order, the Court denied GE's Motion for Summary Judgment as to Count I of Plaintiffs' Amended Complaint (RCRA), holding §6972(b)(2)(C)(i) operates as a bar to a citizen suit only when state actions are commenced and diligently prosecuted specifically under subsection (a)(1)(B) of this section while here the State of Illinois sued under the Illinois Environmental Protection Act and not under § 6972(a)(1)(B) of RCRA. (Doc. # 88, at pg. 11). In reaching its decision, the Court noted that GE "presented no authority" to support its proposition that a state action, filed in state court under the Illinois environmental statute, which is the equivalent of a suit based on RCRA § 6972(a)(1)(B), bars a citizen suit pursuant to § 6972(b)(2)(C)(i). Surprisingly, there are very few cases anywhere which bear on the issue before this court. No circuit court has ruled on the precise issue. Yet, GE submits that dicta in decisions cited by GE leave no doubt that this remains on open issue for decision. Moreover, because of the importance of this controlling issue, and the posture of this case, GE requests that the Court certify the issue for immediate review by the Seventh Circuit Court of Appeals. Here, where all the criteria are met, this court should exercise its discretion and grant GE the right of an immediate permissive appeal.

II. WHETHER A STATE RCRA-EQUIVALENT ACTION BARS A LATER-FILED RCRA CITIZEN SUIT PURSUANT TO RCRA § 6972(b)(2)(C)(i) IS A CONTROLLING QUESTION OF LAW

Under the first factor specified in section 1292(b), a litigant may take an interlocutory appeal if the underlying order "involves a controlling question of law." The Seventh Circuit has concluded that a "question of law" as used in section 1292(b) refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz,* 219 F.3d at 676. The question raised by GE concerns the statutory meaning of an "action under subsection (a)(1)(B) of this section" for purposes of the RCRA citizen suit bar under RCRA § 6972(b)(2)(C)(i). This question is controlling because, if IEPA's state action against GE *does* constitute an "action under subsection (a)(1)(B) of [RCRA § 6972]," then the Plaintiffs' RCRA citizen suit is barred by the prior overlapping Illinois state action, and the Court must dismiss the Plaintiff's Amended Complaint.

III. SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION EXISTS REGARDING THE STATE RCRA-EQUIVALENT ACTION BARRING A LATER-FILED CITIZEN SUIT

In denying GE's motion for summary judgment on Plaintiffs' citizen suit under § 6972(a)(1)(B), the Court acknowledged, but distinguished, the cases cited by GE in support of its argument that the Illinois state RCRA-equivalent action banned Plaintiffs' citizen suit, primarily because the ultimate holding in the cases did not specifically address the issue before this court. Notably, the Court rejected GE's reliance on the Seventh Circuit's decision in *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483 (7th Cir. 2011), because *Adkins* only addressed 42 U.S.C. §

6972(a)(1)(A) applicability to a suit based on violation of a permit, regulation, or similar requirement and did not rule on the equivalency of the state suit to bar an imminent and substantial endangerment claim. Yet, while this court may have justifiably limited its own reliance on *Adkins*, because there was not a direct precedential impact, the circumstance remains that the *Adkins* court did specifically call out for discussion RCRA's "endangerment provision" and the statutory bar to citizen suits in 42 U.S.C. § 6972(b)(2). Specifically, in footnote #2, the 7th Circuit described the precise issue before this court: whether RCRA section 6972(b)(2)(C)(i) could operate as a bar to a citizen suit if the state had commenced its own endangerment action. The court acknowledged and left standing the district court's ruling that, indeed, the state action under its equivalent "endangerment" claim did act as a bar, but did not specifically rule on the issue because it was not raised by either party on appeal. Whether a state RCRA-equivalent action bars a later-filed citizen suit is now ripe for review by the Seventh Circuit upon being specifically raised for decision by this appeal. Notwithstanding the circumstance that the Court could find reasons to distinguish the cases relied upon by GE, the cases undisputedly point to the basis for a "substantial ground for differing opinions" on whether IEPA's state action against GE bars Plaintiffs' citizen suit pursuant to RCRA § 6972(b)(2)(C)(i). This issue is important and will occur again.

IV. AN IMMEDIATE APPEAL FROM THE COURT'S ORDER WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Finally, in determining whether to certify an interlocutory appeal, a court considers whether an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Here, an immediate appeal will satisfy this statutory factor. The Court has stated that its December 18, 2015 Memorandum Opinion and Order is limited to liability under RCRA, and that the Court will address whether and to what extent injunctive relief is available in subsequent proceedings. *See* Doc # 88, at pg. 18. The Court cited *Maine People's Alliance &*

Natural Resources Defense Council v. Mallinckrodt, Inc., 471 F.3d 277, 287 (1st Cir. 2007) in support of its bifurcated approach and ordered the parties to submit a joint position paper on how the Court should proceed to the preliminary injunction stage regarding Plaintiffs' RCRA claim.

The injunctive relief proceedings that followed the court's liability decision in *Mallinckrodt* epitomize the materiality of allowing an immediate appeal of the Court's Order. In *Mallinckrodt*, the court ordered the parties to attempt to agree to an investigative study and then devise a remediation plan. The study took three years to approve and it was estimated that the study would cost $4,000,000 to complete. *Mallinckrodt.*, 471 F.3d at 282. This Court can avoid subjecting the parties to such prolonged litigation, as well as the expense of potentially duplicating or conflicting with IEPA's governance of the process, by allowing an immediate appeal of the Court's December 18, 2015 Order regarding the issue whether a state RCRA-equivalent action bars a citizen suit pursuant to RCRA § 6972(b)(2)(C)(i). A decision by the Seventh Circuit in the affirmative will moot efforts by this court to now require the parties to engage in further proceedings to determine whether injunctive relief is available.

Finally, there is an additional and critical issue which influences the court's decision to exercise its discretion in granting a permissive appeal. At oral argument, and in its decision, this court acknowledged and credited "the several valid policy concerns that arise when a federal court interferes with the ongoing matters that are being litigated in state court . . . " Memorandum Opinion and Order p.11. It is one thing to decide that Congress has placed language in the statute which, in the court's view, expresses the conclusion that "multiple enforcers of RCRA should exist." It is quite another for this court to enter the state's environmental enforcement regime and risk conflicting decisions, duplication, and mandates on exclusively technical issues which may undermine decisions by the IEPA. Moreover, the circumstance is that, as the court noted, the State

Court Consent Order has not yet reached the phase of selection of appropriate remedies. IEPA has proceeded since 2010 to develop a substantial investigative record under the state's established, detailed process, in order to inform and facilitate the selection of appropriate remedies necessary to protect health and the environment.

The court's decision clearly has the potential to run afoul of the Seventh Circuit's admonition in *Supporters to Oppose Pollution Inc. v. The Heritage Group,* 973 F2d 1320 (7th Cir. 1991) that "6972(b)(1)(B) does not authorize a collateral attack on the agency's strategy or tactics." Moreover, the court's decision that it can act now, because the state's diligence prosecution of its Consent Order has not matured to a final remedial action, is contrary to the positions taken by other federal courts which have denied injunctive relief where the remedy implicated second guessing ongoing state action. See, *87 Street Owners Corp v. Carnegie Hill-87th Street Corporation* 251 F. Supp. 2d 1215 (S.D.N.Y 2002). See, also *3000 E. Imperial, LLC v. Robertshaw Controls Co.* 2010 U.S. Dist. Lexis 138661 (C.D. Cal 2010).

Indeed, the very status of the state's ongoing action which has involved significant and extensive data collection, detailed technical submissions, and thoughtful decisions governing the process make this a case where a permissive appeal will not delay the ultimate remedial decision.

V. A STAY SHOULD BE GRANTED PENDING APPEAL

Should the Court grant GE's petition to certify the Court's December 18, 2015 Order for immediate appeal, the Court should grant a stay of the proceedings pending the Seventh Circuit's review of the Order. An important benefit of the Court's certification will be to resolve a threshold issue before GE is subject to potentially conflicting orders and unrecoverable litigation burden is incurred by both parties. GE continues to work with and under the direction of the IEPA and will continue to perform testing while the IEPA decides upon the final remedy. This oversight and direction will continue if the Court enters a stay pending appeal. Therefore, a stay is appropriate in accordance with 28 U.S.C. § 1292(b).

CONCLUSION

The criteria for an interlocutory appeal under 28 U.S.C. § 1292(b) are satisfied. Therefore, GE respectfully requests that the Court certify an interlocutory appeal from the December 18, 2015 Memorandum Opinion and Order. GE also requests that the Court stay the district court proceedings pending the Seventh Circuit's disposition of the appeal.

Respectfully submitted,

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